POLICE DEPARTMENT CITY OF NEW YORK

September 2, 2016

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Carlos Narvaez
Tax Registry No. 926391
Warrant Section
Disciplinary Case No. 2015-14068

Detective Michael Riso
Tax Registry No. 931925
Warrant Section
Disciplinary Case No. 2015-14067

Charges and Specifications:

Disciplinary Case No. 2015-14068

1. Said Sergeant Carlos Narvaez, on or about August 6, 2014, at approximately 0700 hours while assigned to the Warrant Enforcement Squad, and on duty, in the vicinity of [redacted] County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he entered the apartment of Jardi Ruiz without sufficient legal authority.

   P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT

Disciplinary Case No. 2015-14067

1. Said Detective Michael Riso, on or about August 6, 2014, at approximately 0700 hours while assigned to the Warrant Enforcement Squad, and on duty, in the vicinity of [redacted] County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he entered the apartment of Jardi Ruiz without sufficient legal authority.

   P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT

Appearances:

For CCRB-APU: Heather Cook, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, NY 10007

For Respondent Narvaez: John D'Alessandro, Esq.
Quinn Law Firm
399 Knollwood Road
White Plains, NY 10603

For Respondent Riso: James Moschella, Esq.
Karasyk & Moschella, LLP
233 Broadway, Suite 2340
New York, NY 10279

Hearing Dates:
June 13, and July 21, 2016

Decision:
Not Guilty

Trial Commissioner:
DCT Rosemarie Maldonado

REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on June 13 and July 21, 2016. Respondents, through their respective counsel, entered pleas of Not Guilty to the subject charges. CCRB called Jardi Ruiz and Police Officer Daurys Gutierrez as witnesses. Respondents called Lieutenant Steven Maddrey and testified on their own behalves. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondents Not Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

At issue is whether Respondents Carlos Narvaez and Michael Riso acted unlawfully in entering the apartment of Jardi Ruiz. The testimony presented at trial established that the

following facts were not in dispute. On August 6, 2014, Respondents were assigned to the Queens Warrant Squad. At approximately 0600 hours that day, they conducted a visit relating to an investigation card ("I-card") for Jardi Ruiz which had been issued by the 102 Precinct Detective Squad following a domestic violence complaint. The I-card listed [redacted], as Ruiz's address. (Tr. 69-72, 118-22) Ruiz had lived at that location since 2012. His roommate at the time was [redacted] a parolee. (Tr. 13-14)

Respondents knocked on Ruiz's front door for an extended period of time. Ruiz heard the knocking, got up from bed and looked through the peephole. He then phoned his roommate, who had left the apartment, to ascertain whether the officers were there for him. Ruiz did not speak to the officers or answer the door before returning to his bedroom. (Tr. 16, 75, 122)

After hearing "movement" inside the apartment, but getting no response, Respondent Riso went to the roof to determine whether Apartment [redacted] had an alternate means of egress. Initially, he found none and returned to the fifth floor. After Respondents reconvened at the door of the subject apartment, Respondent Riso exited the building to locate the building fire escape and climb the ladder to the fifth floor. As he stood on the fifth floor fire escape, he observed that two of the security gate bars adjacent to the handle had been cut. The building superintendent and Ruiz confirmed that the steel bars had been damaged prior to Respondents' arrival. When interviewed by IAB, the building superintendent noted that the gate had steel bars that could not be "broken" or "popped open" easily or without "proper tools." (Tr. 20-22, 25-28, 77-79, 122, 126-27, 159)

Respondent Narvaez joined Respondent Riso on the fire escape. They conferred and entered the apartment through the window with the damaged security gate. After clearing the apartment, and opening the front door for the uniformed officer to enter, Ruiz was found in his

bedroom. Ruiz peacefully accompanied Respondents to the 102 Precinct. Ultimately, Ruiz pled guilty to criminal trespass. (Tr. 17-19, 40, 55-56, 77-84, 85-88, 92, 95, 127-30)

It is undisputed that the I-card issued for Ruiz was legally insufficient to justify the police's warrantless entry into his home. Respondent Riso specifically acknowledged at trial that the I-card did not authorize them to "enter that apartment unless ... [Ruiz] allowed ... [them] to enter." (Tr. 69-73) Respondents contend, however, that this warrantless entry was nonetheless justified because as the I-card investigation unfolded, the developing facts led them to suspect that a burglary was in progress. Thus, the question before this tribunal is whether Respondents were confronted with objectively reasonable evidence of an emergency that justified their warrantless entry into Apartment [redacted] from the fire escape window.[1]

It is well-settled law that warrantless arrests and seizures inside a home are "presumptively unreasonable." *Payton v. N.Y.*, 445 US 573 (1980). The Fourth Amendment, however, is not violated every time police enter a private residence without a warrant. The presumption of unreasonableness can be overcome where exigent or emergency circumstances exist. *See People v. McBride*, 14 N.Y.3d 440 (2010); *People v. Molnar*, 98 N.Y. 2d 328 (2002). The test for determining such circumstances is an objective one that turns on the totality of the circumstances confronting the police at the time. *U.S. v. MacDonald*, 916 F.2d 766, 769 (2d Cir. 1990), quoting *U.S. v. Martinez-Gonzalez*, 686 F.2d 93 (2d Cir. 1982) ("The essential question in determining whether exigent circumstances justified a warrantless entry is whether law enforcement agents were confronted by an "urgent need" to render aid or take action"). In

[1] I preliminarily note that New York courts have routinely held that fire escapes are common areas of multifamily dwellings where individual tenants, such as Mr. Ruiz and Mr. [redacted] have no "reasonable expectation of privacy." *See U.S. v. Shaw*, 269 F. Supp.2d 90 (E.D.N.Y. 2003); *People v. Hallman*, 237 A.D.2d 17 (1st Dep't 1997) ("Even if reviewed under Federal constitutional standards, a fire escape is deemed to be a common area on which police may be present without the authority conferred by a warrant."), *citing United States v. Holeck*, 811 F.2d 985 (6th Cir. 1986).

People v. Mitchell, 39 N.Y.2d 173 (1976), the New York Court of Appeals established three basic elements for determining whether the emergency exception is applicable:

1. The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property.

2. The search must not be primarily motivated by an intent to arrest and seize evidence.[2]

3. There must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

Respondents' credible testimony persuaded this tribunal that they entered Apartment [redacted] based on objectively reasonable evidence of exigent circumstances as defined above.

The following is a summary of the justification Respondents provided at trial. Respondent Riso testified that as he initially knocked on the door of Apartment [redacted] he held onto the door knob to prevent occupants from suddenly pulling open the door. In this case, the door "closed" when he pulled the handle because it was "a little ajar" and "off center."[3] Respondent Riso heard "somebody behind that door moving back and forth" and indiscernible "rattling noises." He became "a little nervous" that the subject was trying to escape. That is when he ran to the roof to ascertain alternate means of egress. It was at this point that Respondents grew concerned that there were only two members of service at the scene, as compared to the three or four officers who typically work together on these types of jobs. Respondent Narvaez called for uniformed units to assist. (Tr. 64-77, 89-90)

After the sector cars arrived, Respondent Riso exited the building, located the fire escape and noted that the ladder had been lowered to the ground. From the sidewalk he was also able to

---

[2] In *Brigham City v. Stuart*, 547 U.S. 398 (2006), the U.S. Supreme Court moved away from the second subjective prong in *Mitchell* by declining to consider the subjective intent of officers. To date, the New York Court of Appeals has not commented decisively on whether *Brigham* overrules or modifies *Mitchell*. *See People v. Doll*, 21 N.Y.3d 665 (2013)

[3] The IAB investigator in this case also stated that the front door seemed faulty. Specifically he noted that the lock was engaged but the door jamb would not close or sit right. He suggested it seemed like a "faulty installation." (Tr. 158-59, 161-62)

observe that Apartment [redacted] fire escape window was open. Respondent Riso testified that these factors led him to suspect that someone had used the fire escape to flee Apartment [redacted] The uniformed officers who were now at the scene, however, informed Respondent Riso that they had not seen anyone depart from the fire escape. (Tr. 77-79, 90, 95-96)

Respondent Riso climbed to the fifth floor fire escape and realized that the security gate attached to the window was not only open but that two of its steel bars were "cut," "bent in" and "pushed up." According to Respondent Riso, "it looked like somebody may have pushed them in to reach in and unlock the gate." He banged on the gate and yelled, "police, come to the window." He got no response and did not hear any noise from within. It is then that Respondent Riso first began to suspect that there might be a burglar in the apartment. He explained:

> I thought it might have been more than somebody leaving and trying to escape the location because you wouldn't need to bend the bars ... to open the gate if you're inside. My suspicion that it was possibly could have a burglary going on and somebody inside this location.

(Tr. 79, 82-83, 92, 96-102)

When Narvaez joined him on the fire escape he explained the compromised state of the gate and they decided to go inside to ensure that a burglary was not taking place. (Tr. 84, 102-03) Once inside Apartment [redacted], he let Officer Gutierrez in. (Tr. 104) Before leaving the apartment, Respondent Riso bent back the bars on the window and locked the gate. He estimated that they departed the location over an hour after arriving. (Tr. 86-88, 99-105)

Respondent Narvaez corroborated much of Respondent Riso's testimony. Like Respondent Riso, he recalled that when they arrived at the apartment, Riso knocked on the door while holding onto the door knob. The door appeared "ajar" and he recalled Riso indicating that he heard movement inside. (Tr. 122, 131-34)

While Respondent Riso investigated the roof, Respondent Narvaez called for back-up. Respondent Riso returned indicating that he could not find a means of egress from the roof. Respondent Riso remained at the door while Respondent Narvaez went downstairs to meet the responding officers. (Tr. 123-24, 135) Respondent Narvaez returned to the fifth floor with Officer Gutierrez while two other officers remained on the ground level. Respondent Riso then went downstairs to determine whether "there was any access to the apartment street side." It was communicated to Respondent Narvaez that the fire escape ladder was down "and he was going up street side to the location. To the window, fifth floor." Narvaez explained, "[a]t that time, I made the decision to knock on the fourth floor apartment that was directly below... I knocked on the door . . . and indicated to [the resident] what the situation was and if he would allow me to go through the apartment to get access to the fire escape." According to Respondent Narvaez, Officer Gutierrez remained guarding the door to Apartment [redacted] but he did not recall if he told Gutierrez his plan to go up the fire escape from the fourth floor apartment. (Tr. 124-27, 137-40)

Respondent Narvaez climbed up one level to the fire escape where Respondent Riso was located. Riso pointed out, and Respondent Narvaez observed, that the window gate bars were cut and detached from the cross bar where they had been connected.[4] He did not recall whether the window itself was open. They stood for a minute announcing themselves and then made the decision to enter. Respondent Narvaez recalled giving a "brief synopsis" to a sector officer via TAC and directing that the front door be secured because the security gate bars had been cut. (Tr. 128-129) When asked on cross examination why he entered the apartment, Respondent Narvaez testified "because at that time collectively with the information I had at that particular second, the I-card took a back seat to the investigation that was at that particular moment." In addition to

[4] Respondent Narvaez also indicated that the bars were actually "a lot more detached" than what was depicted in the photos in evidence. (Tr. 128)

the cut bars, he also relied on Respondent Riso's word that the fire escape ladder was initially down when he made the decision to enter. (Tr. 127-29, 141-45, 148-49)[5]

There were several key factors which convinced this tribunal that Respondents were telling the truth as they articulated their rationale for entry. First, I found Respondents' demeanor to be straightforward and calm as they meticulously related the details of their investigation and the various steps they took as events quickly unfolded. Second, for the most part, Respondents' accounts were consistent both at trial and over time. Most variations in their accounts seem to be the type attributable to the natural vagaries of memory over time rather than an intent to mislead. Third, I found their version of events to be logical and in conformity with common sense. I acknowledge certain shortcomings in their testimony. For example, Respondent Narvaez could not recall which officers were on TAC and thus which officers received notification that Respondents were entering the apartment through the fire escape. However, given the totality of circumstances, my assessment is that Respondents were very experienced and capable professionals who were forthcoming and credible about what they saw, what they did and why they did it.

In making this finding I note that the primary evidence independent of the testimony of the principals sought to refute that Respondents notified the team of a possible burglary. However, even though Officer Guiterrez was an unbiased witness, I found his account to be unreliable. It is concerning that at trial he expressed absolute certainty about his clearly erroneous recollection of certain facts. His insistence that the apartment at issue was on the fourth floor and not the fifth floor illustrates this point. Although alone this would not be

[5] Respondent Narvaez made a notation in his memo book about entering through the fire escape but did not make a notation about a possible burglary. (Tr. 147-48)

dispositive of a witness's reliability, here it was part of a troubling pattern. For example, Officer Gutierrez seemed certain about an improbable sequence of events relating to Sergeant Narvaez's use of the fourth floor apartment to access the fire escape. It is uncontested that the apartment's air conditioner was removed to enable Sergeant Narvaez to climb onto the fire escape. Officer Gutierrez, however, insisted that Sergeant Narvaez offered to put back the air conditioner in the fourth floor apartment before the arrest was made and the "incident was resolved." The following is his testimony on this point:

Q. That was after the incident was resolved and the sergeant went back down and offered the people below to put their air conditioner back in, right?
A. No, that's when we went downstairs to knock on the door....
Q. But you were with the sergeant when he went downstairs and offered to put the people's air conditioner back in that he had removed, right?
A. Yea, but that was way before the incident was resolved.
Q. That was before? Are you certain of that?
A. Hundred percent.
Q. A hundred percent?
A. Yes. (Tr. 59)

Simply put, Officer Gutierrez's account of the sequence of events was implausible. Given the quick sequence of events, Respondent Narvaez would not have had the opportunity to put back the air conditioner before proceeding to assist Respondent Riso on the fire escape. Although I found Officer Gutierrez to be unbiased, given the totality of circumstances here, his recollection proved to be undependable and therefore lacking in probative weight.

Having credited Respondents' accounts, I must now determine whether they acted reasonably and exercised good judgment when they determined that they had sufficient justification to enter the apartment. Courts have found "exigent circumstances justifying a [warrantless] entry into a house when the police have come upon what is believed to be a burglary in progress." *See Martin v. Tatro*, 2005 U.S. Dist. LEXIS 41896 (N.D.N.Y. 2005).

citing *People v. Peterkin*, 12 A.D.3d 1026 (4th Dept. 2004)("the emergency exception to the warrant requirement applies because the police justifiably believed that they had interrupted a burglary or trespass in progress and that entry into the apartment was necessary to prevent the commission of a crime."); *People v. Martinez*, 267 A.D.2d 101 (1st Dept. 1999); *People v. McKnight*, 261 A.D.2d 926 (4th Dept. 1999) ("While investigating a 911 report of a burglar alarm at an apartment building, police officers legally entered defendant's apartment . . . the officers had reasonable grounds to believe that there was an emergency at the apartment requiring their immediate assistance for the protection of life or property.")

Although Respondents did not respond to a call reporting a burglary, the evidence uncovered as part of this quickly unfolding investigation was sufficient for a reasonable officer to suspect that a burglary was in progress and that their entry was necessary to prevent the commission of a crime. As set forth in more detail above, the officers knocked on the front door of Apartment [redacted] for an extended period of time noting that it was ajar and off center. As they knocked, there was movement inside the apartment and "a rattling noise" that could not be made out. Concerned that the occupant might try to flee without detection, uniformed officers were called to the scene and the exterior of the building was assessed for escape routes. From the sidewalk level, Respondent Riso observed the fire escape ladder extended to the ground and the window to Apartment [redacted] open. At first, this evidence seemed to confirm Respondent Riso's suspicion that someone was trying to flee the apartment. Before climbing upstairs, however, the uniformed members of service watching the building informed him that no one had exited via the fire escape. Respondent Riso climbed the fire escape and when he reached the fifth floor immediately noticed that the security gate was open and that two of its steel bars had been cut and bent in a manner that allowed the gate to be opened from outside. Respondent Riso adjusted

his theory that someone was trying to flee because "you wouldn't need to bend the bars ... to open the gate if you're inside." (Tr. 83) It is at this point that Respondent Riso began to suspect that a burglary might be in progress inside. Respondent Narvaez also became concerned and gained access to the 5th floor fire escape through the apartment immediately below. Together they assessed the troublesome new evidence. Respondent Narvaez used TAC to put over a brief and approximately 45 minutes after having arrived at this location entered the apartment.

I conclude that the evidence before Respondents at that time would lead a prudent and reasonable officer to see a need to act with great haste. Even absent the other factors present in this case, discovering steel security bars cut and bent to allow access into an apartment would be a particularly alarming indicator of a crime. In addition, I believe that the objective facts that unfolded were sufficient to establish that, as articulated by Respondent Narvaez, they put the I-card investigation aside and were now investigating a crime they believed could be in progress.

Moreover, even if Respondents' determination that an emergency existed was based on slightly less than reasonable grounds, that finding alone would not render their conduct sanctionable in this case. In order to sanction civil service employees for misconduct, there must be some showing of fault on the employee's part, either that he acted intentionally (*see Reisig v. Kirby*, 62 Misc.2d 632, 635, 309 N.Y.S.2d 55, 58 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008, 299 N.Y.S.2d 398 (2d Dep't 1969)), or negligently (*see McGinigle v. Town of Greenburgh*, 48 N.Y.2d 949, 951, 425 N.Y.S.2d 61, 62 (1979)). Mere errors of judgment, lacking in willful intent and not so unreasonable as to be considered negligence, are not a basis for finding misconduct. *See Ryan v. New York State Liquor Auth.*, 273 A.D. 576, 79 N.Y.S.2d 827, 832 (3d Dep't 1948); *Dep't of Correction v. Messina*, OATH Index No. 738/92 (July 9, 1992). For the reasons already stated above, the record did not prove that Respondents' conduct was so careless

and flawed that a reasonable police officer would not have acted similarly under these circumstances. Nor was there convincing evidence that they acted with a bad faith motive.

I have considered and rejected all other evidence and arguments presented by the CCRB. Accordingly, I recommend that Respondents be found not guilty of the charged misconduct.

Respectfully submitted,

Rosemarie Maldonado
Deputy Commissioner Trials

APPROVED

OCT 20 2016

JAMES P. O'NEILL
POLICE COMMISSIONER